Shell Oil and Gas (M) LLC v Ketua Pengarah Hasil Dalam Negeri

HIGH COURT (KUALA LUMPUR) — JUDICIAL REVIEW APPLICATION NO WA-25–239–04 OF 2022
WAN AHMAD FARID J
6 FEBRUARY 2024

Revenue Law — Income Tax — Petroleum income tax — Whether Revenue had wrongly construed new agreement between new partners as a 'continuing partnership' of the former partners under s 2(3) of Petroleum Income Tax Act 1967 ('PITA') — Whether PITA had no application as matter in dispute before court did not concern one petroleum agreement but two mutually exclusive agreements — Whether any doubt or ambiguity in taxing statute must be resolved in favour of taxpayer and against the Revenue

The applicant herein was previously in partnership with two other parties in an oil exploration contract ('the first contract'). When the first contract ended in June 2019, a new partnership (to which the applicant was not a party) was formed to pursue with the objectives of the first contract. The respondent treated the new partnership as a 'continuing partnership' under s 2(3) of the Petroleum Income Tax Act 1967 ('PITA') and refused to treat taxable matters pertaining to the new contract between the new partners separately from matters which came under the first contract. The respondent consequently disallowed certain claims made by the applicant in respect of capital expenditure it had incurred on assets related to the first contract and also rejected the applicant's notice of appeal (in Form Q) to the Special Commissioners of Petroleum Income Tax against the respondent's decision. The applicant applied for judicial review ('JR') to declare the respondent's action as invalid and to quash the respondent's rejection of its tax return for Year of Assessment 2020 and the rejection of the Form Q.

Held, granting the reliefs sought in the JR application:

(1) Section 2(3) of the PITA had no application in the instant case. It could only apply if there was one petroleum agreement in question and not when there were two mutually exclusive agreements as in the present case — one which expired on 8 June 2019 (to which the applicant was a party) and the other which took effect from 9 June 2019 (to which the applicant was not a party). There was no overlapping between the two agreements (see paras 22–23 & 34).

(2) If Parliament had intended the succeeding partnership to be a 'continuing partnership' of the old partners, despite the mutually

exclusive agreements, it would have stated so in s 2(3) of the PITA and the word 'agreements' would have been used (see para 25).

(3) In the instant case, the new agreement between the new partners was not a continuing partnership between the old partners. The first fixed-term contract had ended and there was no evidence to show any supplementary agreement between the original partners to extend the validity period of the first agreement (see para 30).

(4) Being a tax legislation, the provisions in PITA had to be read strictly and in the event of doubt or ambiguity, a construction that imposed liability on the taxpayer could not be adopted and the doubt had to be resolved against Revenue and not in its favour (see paras 32–33).

[Bahasa Malaysia summary

Pemohon di sini sebelum ini adalah dalam perkongsian dengan dua pihak lain dalam kontrak cari gali minyak ('kontrak pertama'). Apabila kontrak pertama berakhir pada Jun 2019, perkongsian baharu (yang mana pemohon bukan pihak) telah dibentuk untuk meneruskan dengan objektif kontrak pertama. Responden menganggap perkongsian baharu itu sebagai 'perkongsian berterusan' di bawah s 2(3) Akta Petroleum Cukai Pendapatan 1967 ('APCP') dan enggan menangani perkara bercukai berkaitan kontrak baharu antara rakan kongsi baharu secara berasingan daripada perkara di bawah kontrak pertama. Responden kemudiannya tidak membenarkan tuntutan tertentu yang dibuat oleh pemohon berkenaan dengan perbelanjaan modal yang telah ditanggung ke atas aset yang berkaitan dengan kontrak pertama dan juga menolak notis rayuan pemohon (dalam Borang Q) kepada Pesuruhjaya Khas Cukai Pendapatan Petroleum terhadap keputusan responden. Pemohon memohon semakan kehakiman ('JR') untuk mengisytiharkan tindakan responden sebagai tidak sah dan membatalkan penolakan responden terhadap penyata cukainya bagi Tahun Taksiran 2020 dan penolakan Borang Q.

Diputuskan, memberikan pelepasan yang diminta dalam permohonan JR:

(1) Seksyen 2(3) APCP tidak terpakai dalam kes semasa. Ia hanya boleh digunakan jika terdapat satu perjanjian petroleum yang dipersoalkan dan bukan apabila terdapat dua perjanjian yang saling eksklusif seperti dalam kes ini — satu yang tamat tempoh pada 8 Jun 2019 (yang mana pemohon adalah pihak) dan satu lagi yang berkuat kuasa dari 9 Jun 2019 (yang mana pemohon bukan pihak). Tiada pertindihan antara kedua-dua perjanjian (lihat perenggan 22–23 & 34).

(2) Sekiranya Parlimen berhasrat perkongsian seterusnya menjadi 'perkongsian berterusan' rakan kongsi lama, walaupun terdapat perjanjian yang saling eksklusif, ia akan menyatakan demikian dalam s 2(3) APCP dan perkataan 'perjanjian' akan digunakan (lihat perenggan 25).

(3) Dalam kes semasa, perjanjian baharu antara rakan kongsi baharu bukanlah perkongsian berterusan antara rakan kongsi lama. Kontrak bertempoh tetap pertama telah tamat dan tiada keterangan menunjukkan sebarang perjanjian tambahan antara rakan kongsi asal untuk melanjutkan tempoh sah perjanjian pertama (lihat perenggan 30).

(4) Sebagaimana perundangan cukai, peruntukan dalam APCP perlu dibaca dengan ketat dan sekiranya terdapat keraguan atau kesamaran, penggubalan yang mengenakan liabiliti ke atas pembayar cukai tidak boleh diterima pakai dan keraguan itu perlu diselesaikan terhadap Lembaga Hasil dan bukan bagi pihaknya (lihat perenggan 32–33).]

Cases referred to

Exxon Chemical (M) Sdn Bhd v Ketua Pengarah Dalam Negeri [2006] 1 MLJ 428, CA (refd)

Kesultanan Pahang v Sathask Realty Sdn Bhd [1998] 2 MLJ 513, FC (refd)

Lie Kok Keong v Tang Container & Services Sdn Bhd [2004] 1 MLJ 373, CA (refd)

National Land Finance Co-operative Society Ltd v Director General of Inland Revenue [1994] 1 MLJ 99, SC (refd)

Wan Khairani binti Wan Mahmood v Ismail bin Mohamad & Anor [2008] 1 MLJ 164, CA (refd)

Legislation referred to

Petroleum Income Tax Act 1967 ss 2(3), 43(1), Second Schedule, para 17

Anand Raj (with Foong Pui Chi and Cheong Wen Yie) (Shearn Delamore & Co) for the applicant.

Ashrina bt Ramzan Ali (with Surani bt Che Ismail) (Revenue Counsel, Inland Revenue Board of Malaysia) for the respondent.

Wan Ahmad Farid J:

THE FACTUAL BACKGROUND

[1] The applicant, Shell Oil and Gas (M) LLC, is in the business of searching, winning and obtaining natural gas and condensates.

[2] The applicant was one of the joint venture partners and parties to the PETRONAS Carigali Sdn Bhd ('PCSB') and Nippon Oil Exploration (Sarawak) LLC ('Nippon') — in respect of Block SK8 Production Sharing Contract dated 11 July 1989 ('old SK8 PSC').

[3] Under the old SK8 PSC, the applicant was the operator for a fixed period of 15 years, which commenced from the date of the first commercial

production. It has expired on 8 June 2019. As an operator, the applicant was responsible for filing tax returns and managing the tax matters of the old SK8 PSC. After the expiry of the old SK8 PSC, the area was relinquished to PETRONAS. PETRONAS then appointed PCSB as the new operator for the new SK8 PSC ('new SK8 PSC').

[4] It is not in dispute that the applicant and Nippon are not parties to the new SK8 PSC. The new SK8 PSC was signed by PETRONAS, PCSB dan E&P Malaysia Venture Sdn Bhd ('E&P Malaysia'), and it took effect from 9 June 2019.

[5] However, despite the fact that the old SK8 PSC had expired on 8 June 2019 and the applicant is not a party to the new SK8 PSC, the respondent ('the Revenue') had treated the new SK8 PSC as a 'continuing partnership' of the old SK8 PSC under s 2(3) of the Petroleum Income Tax Act 1967 ('the PITA'). It provides as follows:

> Where a partnership is succeeded by another at any time during the period of its petroleum agreement, and at least one of the originai parties to that agreement who was a member of the succeeded partnership is a member of the succeeding partnership, both partnerships shall be treated for the purposes of this Act as one continuing partnership.

Since the Revenue treated the new SK8 PSC as a 'continuing partnership', it had disallowed the applicant claim for balancing allowances under para 17 of the Second Schedule to PITA on the capital expenditure that the applicant had incurred on assets related to the old SK8 PSC.

[6] At all material times, the applicante position is that there was no continuing partnership on the facts as there was no overlap between the old SK8 PSC, which had already expired on 8 June 2019, and the new SK8 PSC, which only took effect from 9 June 2019. As alluded to earlier, PCSB is the new operator of the new SK8 PSC.

[7] Since the applicant was no longer involved in the new SK8 PSC, the applicant proposed to the Revenue to create two tax reference numbers — one is for the old SK8 PSC, and the other is for the new SK8 PSC of which PCSB would be responsible for the filing of tax returns and managing the tax matters since it is now the new operator.

[8] The proposal made by the applicant was not acceptable to the Revenue. By a letter dated 28 November 2019, the Revenue, while acknowledging that PCSB was now the new operator of the new SK8 PSC, insisted that PSCB would be responsible for filing the tax return for the new SK8 PSC for Year of

Assessment 2020. In the circumstances, the Revenue was of the view that there was no need to have two tax references — one each for the old SK8 PSC and new SK8 PSC.

[9] In response to the Revenue's position, the applicant highlighted that there was no continuing partnership in the context of s 2(3) of the PITA. The applicant reasserted that there was no overlap between the old SK8 PSC and the new SK8 PSC and that they should be treated as two separate agreements. In a letter to the Revenue dated 29 April 2020, the applicant stated, inter alia, as follows (where 'SOGM' refers to the applicant):

> Please be informed, subsequent to post expiry of the SK8 PSC, SOGM and Nippon would stili be obtaining revenue due to PSC restatement. As both SOGM and Nippon are no longer legal partners in the new SK8 PSC Agreement, PCSB as the Operator of the New SK8 PSC is not privy to the information/data of the SOGM and Nippon under the old SK8 PSC. In this regard, we are unable to share such information/data arising from any PSC restatement for purposes of tax filing with PCSB. Hence, Shell and SOGM would not be able to report this revenue to tax under PITA where PCSB is managing the tax administration of the SK8 PSC as per your letter dated 22nd September 2019. Legally, both Shell and SOGM would only be able to report such income under the old SK8 PSC income tax registration where Shell is the Operator and the submitter of the tax return.

[10] However, the Revenue was unperturbed by the applicant's explanation. It maintained its position that the new SK8 PSC is a continuing partnership for the purpose of s 2(3) of the PITA.

[11] On 30 October 2020, PETRONAS filed the e-CPP Form for SK8 PSC for YA 2019. The applicant, through PETRONAS, also filed a notice of appeal by way of Form Q dated 27 November 2020 to appeal against the Deemed Assessment for YA 2019.

[12] Subsequent to that, the applicant, through an email dated 31 October 2021 and a separate letter dated 29 October 2021, had filed an e-CPP Form for YA 2020 under protest to the Revenue. The applicant also filed a notice of appeal in Form Q for YA 2020 to the Special Commissioners of Petroleum Income Tax ('SCPIT') pursuant to s 43(1) of the PITA.

[13] By way of another letter dated 30 November 2020, the applicant wrote to the Revenue stating that the applicant was unable to submit its initial tax estimate of tax payable (ie Form CP250) and revision of estimate of tax payable (ie Form CP251) as part of PSC SK8 from YA 2021 onwards due to the refusal by PCSB as the new operator to include the applicant in Form CP250 and Form CP251 submission to the Revenue. The applicant made another appeal for the Revenue to consider the need to have two tax references. The letter, inter

alia, states as follows:

> Considering that PCSB is now *excluding* SOGM from the Form CP250 and CP251 submission to the IRB, we would like for IRB to reconsider the earlier position and issue a new tax reference number for the new SK8 PSC.

[14] However, the Revenue, through its letter dated 19 January 2022, informed the applicant that the e-CPP Form for YA 2020 which was filed under protest and Form Q for YA 2020 would not be accepted and processed because the applicant was no longer partners of the chargeable person (the new PSC SK8), which is PETRONAS, in YA 2020 and e-CPP Form for YA 2020 had already been filed by PCSB as the new operator ('the impugned decision').

[15] It is not in dispute that on 17 November 2022, the Revenue had forwarded Form Q for YA 2020 to SCPIT upon insistence by the applicant.

[16] Aggrieved by the impugned decision, the applicant commenced this application for judicial review, inter alia, for the following orders:

(a) an order for certiorari to quash the impugned decision in rejecting the applicant's Tax Return for Years of Assessment for YA 2020;

(b) an order for Certiorari to quash the impugned decision in the rejecting the applicant's Form Q for YA 2020 dated 26 November 2021; and

(c) a declaration that the impugned decision contained in the Revenue's letter dated 19 January 2022 is invalid.

[17] Leave to commence this judicial review application was granted by this court on 29 June 2022.

THE JUDICIAL REVIEW

[18] The application for judicial review is supported by the affidavit of Kalsumawati bt Mohd Aris in encl 3 ('AIS3'). Puan Kalsumawati is the Country Tax Manager for Malaysia, Indonesia, Vietnam and Japan.

[19] Parties have exchanged affidavits, which will be referred to as need arises.

[20] The main issue in this application for judicial review is whether the old SK8 PSC is a continuing partnership of the new SK8 PSC within the meaning of s 2(3) of the PITA.

[21] To begin with, the old SK8 PSC has already expired on 8 June 2019. It was not renewed. On the contrary, the new SK8 PSC was executed by PETRONAS, PCSB and E&P Malaysia. The applicant has no role in the new SK8 PSC. It is not even a party. However, the Revenue's understanding of s 2(3) of the PITA is that the new SK8 PSC is 'one continuing partnership' with the old one.

[22] It should be recalled that that the requirements in s 2(3) of the PITA are as follows:

(a) the partnership is succeeded by another at any time during the period of the petroleum *agreement*;

(b) at least one of the original parties to that *agreement* who was a member of the succeeded partnership is a member of the succeeding partnership; and

(c) both *partnerships* shall be treated for the purposes of PITA as one continuing partnership.

For one, s 2(3) only makes reference to one agreement. It does not say 'agreements'. But we have before us is not only two agreements but two mutually exclusive agreements. One expired on 8 June 2019 and the other took effect from 9 June 2019. There was no overlapping either.

[23] I am fully cognisant of s 4(3) of the Interpretation Acts 1948 and 1967, which states that words and expressions in the singular include the plural, and words and expressions in the plural include the singular. However, to my mind, s 2(3) of the PITA is *sui generis* in that it refers to 'a partnership is succeeded by another'. In the context of s 2(3), it cannot be 'two partnerships' since only one partnership can be succeeded by another. It is therefore my consideree! view that the word 'agreement' in s 2(3) of PITA cannot be read in isolation with the phrase 'a partnership is succeeded by another'.

[24] I believe that there is a respectable authority on the proposition that I have alluded to. The Federal Court in *Kesultanan Pahang v Sathask Realty Sdn Bhd* [1998] 2 MLJ 513 (FC), through Mohd Azmi FCJ, observed one cannot interpret a certain word in isolation without regard to the context and circumstances in which the word is used. The learned judge further held that to turn a blind eye to the obvious repugnancy and inconsistency existing by the application of the general definition to the specifie and special Act or Enactment under consideration would be wholly unjustified and wrong in law.

[25] My respectful view is that Parliament intended that for s 2(3) of the PITA to be applicable, there can only be one agreement. If the intention of Parliament were for the partnerships to be treated as one continuing

partnership despite the mutually exclusive *agreements,* it would have stated so in s 2(3). It would have used 'agreement or agreements'. In any event, the old SK8 PSC had already expired. It was not renewed.

[26] Before me, the learned senior revenue counsel submitted otherwise. In her written submission, the learned SRC intimated to the court that the Revenue had been informed by PETRONAS that the SK8 PSC is a continuing partnership agreement and there is no termination of the SK8 PSC, but it is being continued with a new partner.

[27] Unfortunately, nothing in the affidavits in reply of the Revenue alluded to this assertion. It is therefore what it is — a mere statement from the Bar. A statement from the Bar is not evidence: see *Lie Kok Keong v Tang Container & Services Sdn Bhd* [2004] 1 MLJ 373 (CA).

[28] However, even if we assume for one moment that PETRONAS made the statement as claimed by the Revenue, of which no finding is made here, such assertion does not carry any legal weight and does not bind this court.

[29] The learned SRC further submitted that since SK8 PSC is a 'continuing partnership, the applicant is not eligible to claim balancing allowance and that para 40 of the Second Schedule of PITA is inapplicable as no disposai of assets occurred.

[30] With respect, I find difficulty in accepting the argument that s 2(3) is applicable and that the new SK8 PSC is a continuing partnership with the old SK8 PSC. They are not. As submitted by learned counsel for the applicant, to which I respectfully agree, that the old SK8 PSC is a fixed-term contract and has expired on the date stipulated in the contract. There is no evidence before this court that there was a supplementary agreement by the same parties to extend the period of the old SK8 PSC.

[31] In my considered view, the wilful omission made by Parliament in referring to 'agreements' has to be respected by the court. The Court of Appeal in *Wan Khairani binti Wan Mahmood v Ismail bin Mohamad & Anor* [2008] 1 MLJ 164 (CA) reminded us as follows:

> The contention further is that the deficiency in the Act, if any, cannot be provided by the court particularly when the language is plain and simple and the assumed gaps cannot be filled by the court and that the willful omission made by the Legislature has to be respected by the court. On the Legislature willfully omitting to incorporate something of an analogous law in a subsequent statute, or even if there is a *casus omissus* in a statute, the language of which is otherwise plain and unambiguous, the court is not competent to supply the omission under the guise of interpretation by analogy or implication, something what it thinks to be a general

principle of justice and equity, reliance has been placed upon *CST v Parson Tools* and *Plants, Lord Howard De Waiden v IRC, Johnson v Moreton and Harcharan Singh v Shivran.*

[32] PITA is a tax legislation. It is well-settled that the courts have refused to adopt a construction of a taxing Act that would impose liability when doubts exist: see *National Land Finance Co-operative Society Ltd v Director General of Inland Revenue* [1994] 1 MLJ 99 (SC).

[33] The proposition is reiterated by the Court of Appeal in *Exxon Chemical (M) Sdn Bhd v Ketua Pengarah Dalam Negeri* [2006] 1 MLJ 428 (FC), where it was held that the principle that a provision in a taxing statute must be read strictly is one that is to be applied against revenue and not in its favour.

FINDINGS

[34] Since s 2(3) of the PITA is not applicable, the impugned decision is tainted with anisminic error and, therefore, is amenable to judicial review on the aforesaid ground alone.

[35] I therefore make the following orders:

(a) an order for certiorari to quash the impugned decision in rejecting the applicant's tax return for YA 2020;

(b) an order for certiorari to quash the impugned decision in the rejecting the applicant's Form Q for YA 2020 dated 26 November 2021; and

(c) a declaration that the impugned decision contained in the Revenue's letter dated 19 January 2022 is invalid.

I am also making consequential orders relating to prayers (e) and (f). The remaining alternative prayers are disallowed.

[36] There shall be no order as to costs.

[37] Since my decision is anchored on the interpretation of s 2(3) of the PITA, I do not find it necessary to address the remaining issues raised by the Revenue.

Reliefs sought in the JR application granted.

Reported by Ashok Kumar